TETUAN BAKAR & PARTNERS

v.

PRORAK SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZMEL MAAMOR J
[SUIT NO: S2-22-410-2001]
15 JANUARY 2003

CIVIL PROCEDURE: *Writ of summons - Striking out - Rules of High Court 1980, O. 18 r. 19 - Application to strike out plaintiff's writ to set aside judgment - Judgment affirmed by Court of Appeal - Whether plaintiff's action frivolous, vexatious and abuse of court process*

The plaintiff had applied to set aside a judgment handed down by another division of this court. The matter was also taken up before the Court of Appeal but judgment was given to the plaintiff's disfavour. The plaintiff then applied, allegedly on new grounds, to set aside the said suit. The defendant applied to the deputy registrar to strike off the plaintiff's action and this was granted. Hence, this appeal by the plaintiff.

Held:

[1] Where a party is dissatisfied with a decision of the Court of Appeal, the proper procedure to be taken would be to lodge an appeal with the Federal Court, initially by obtaining leave. Regarding the present matter, the Court of Appeal had decided that the said judgment remain undisturbed. Therefore, it would be improper for the plaintiff to again re-litigate the decision of the Court of Appeal in another High Court. Furthermore, the doctrine of *res judicata* applies in the present matter. (p 721 e)

[2] The party who had been actually aggrieved in the said civil suit was Tenaga Nasional Bhd ('TNB'). There were doubts regarding the propriety of the plaintiff's present action as it had named TNB as one of the defendants, instead of a co-plaintiff. By not doing the latter, the purpose of applying to set aside the said civil suit would be completely meaningless as the party who was actually aggrieved by the decision was no longer interested to pursue the matter. (pp 721 h & 722 a)

[3] The plaintiff pursued the present action solely to avoid liability for the negligence action brought by TNB. It would be most improper for the plaintiff to seek some form of redress in respect of its wrongful act from this court. (p 722 b-c)

[4] In the present circumstances, the plaintiff's action was vexatious, frivolous and an abuse of court process. (p 722 d)

[Plaintiff's appeal dismissed with costs.]

Case(s) referred to:
Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 18 r. 19(1), O. 92 r. 4

For the plaintiff/appellant - Amir Ismail (Goh Peng Hong); M/s Bakar & Partners
For the 4th defendant/respondent - SC Yong; M/s SC Yong & Assoc

Reported by M Maheswaran

JUDGMENT

Azmel Maamor J:

By way of a writ action the plaintiff in this case applied to set aside the judgment of a High Court dated 22 July 1997 given by YA Dato' T. Selventhiranathan *vide* Civil Suit No. D1-22-107-1988 (encl. 1). Subsequently, an application to strike off the plaintiff's writ of summon and statement of claim under O. 18 r. 19(1) and/or O. 92 r. 4 of the Rules of the High Court 1980 was made by defendant No. 4 (encl. 7). The learned deputy registrar who heard the 4th defendant's application decided to allow it. As such the plaintiff's writ of summon and statement of claim were struck off with costs. Hence this appeal to the judge in chambers by the plaintiff against the decision of the learned deputy registrar (encl. 25).

Reading from the statement of claim it was clear to me that there was an inseparable link between this case and the case of Civil Suit No. D1-22-107-1988 which was heard and decided by YA Dato' T. Selventhiranathan particularly his decision dated 22 July 1997. It also involved the same subject matter ie, an application to set aside the judgment dated 22 July 1997. Because the application to set aside the said judgment was refused the matter was taken up to the Court of Appeal. There at the Court of Appeal, the appeal was dismissed. Since this case, in reality, was a continuation of what had transpired in the abovesaid proceedings I think it would be most pertinent for me to annex the grounds of judgment of the learned High Court judge and the judgment of the Court of Appeal. *(Editor's note: For the High Court judgment, please refer to Annexure I at p. 723 below and for the Court of Appeal judgment please see Tenaga Nasional Bhd v. Prorak Sdn Bhd & Anor [2000] 1 CLJ 553).*

Since the facts of the case had been well laid down in Annexures I in the Court of Appeal it would be a futile effort for me to repeat them. The only additional fact that I wish to add is that in the instant action the sole plaintiff were the solicitors of Tenaga Nasional Berhad who was named as defendant no. 3 in the instant suit. The plaintiff in this instant suit had also added the counsel and solicitors for the plaintiffs in the earlier suit as defendant no. 4 and defendant no. 5 respectively. Defendant no. 6 was a witness (PW1) who had given evidence for the plaintiff in the proceedings of the earlier suit.

The plaintiff decided to bring this action to set aside the said judgment based on new grounds.

The appeal against the decision of the learned deputy registrar was heard before me on 23 October 2002. After having heard submissions from counsels for both sides I decided to dismiss the plaintiff's appeal. My grounds are as follows.

The issue of setting aside of the judgment of the learned High Court judge had been fully argued not only at the High Court but also at the Court of Appeal. As it now stands it is the decision of the Court of Appeal which ruled that on the circumstances of this case the application to set aside the judgment of the High Court dated 22 July 1997 be dismissed. In other words the Court of Appeal decided that the said judgment of the High Court should remain undisturbed. Such being the position the proper procedure to be taken by any party who was still dissatisfied with the decision of the Court of Appeal would be to lodge an appeal to the Federal Court, initially by obtaining leave. For the plaintiff to again reopen the matter in another High Court would in my view be completely out of order. Firstly, it is most improper for this High Court to reopen the decision of the Court of Appeal. Secondly, on the facts of this case the principle of *res judicata* applies. As stated by the Court of Appeal at p. 567: "Once the first application was dismissed, it was not open to the appellant to make a second application to set aside the judgment on a different ground. It would as Haidar JCA, observed during the course of Encik Zainur's argument, amount to presenting one's case in installments. That is something the law does not permit." On this ground alone the plaintiff's appeal should be dismissed.

Even assuming that the plaintiff's application is proper, how then would the subsequent action be able to proceed. The party who was actually aggrieved by the judgment of 22 July 1997 is Tenaga Nasional Bhd. who is now named as defendant No. 3. As a matter of fact in the course of hearing of this application I have asked the plaintiff's counsel as to the propriety of this action by the plaintiff not naming TNB as co-plaintiff. Would it then serve any useful purpose? Apparently TNB did not wish to cooperate with the plaintiff any

further. As a matter of fact TNB had filed suit against the plaintiff seeking damages for its act of negligence. In my view without TNB being made a co-plaintiff in this application the purpose of applying to set aside the judgment of 22 July 1997 would be completely meaningless since the aggrieved party, TNB was no longer interested to pursue the matter.

The inference that can be derived from the plaintiff's action taken at this late stage in this case was purely for the plaintiff's personal interest. This action was taken by plaintiff solely for the purpose of avoiding liability for an action of negligence brought by TNB. Having regard to the alleged acts of negligence committed by the plaintiff's partner at the earlier hearing before YA Dato' T. Selventiranathan I was of the view that it would be most improper for the plaintiff to seek some form of shield in respect of its wrongful act from this court. I do not think the plaintiff deserved such assistance from this court.

After having carefully considered the whole circumstances of this case I arrived at the conclusion that the plaintiff's action was frivolous and vexatious or is otherwise an abuse of the process of this court, well within the ambit of O. 18 r. 19(1) of the Rules of the High Court 1980. I therefore dismissed the appeal with costs.

ANNEXURE I

In the High Court in Malaya at Kuala Lumpur
[Commercial Division]

Civil Suit No D1-22-107-1988

Between

1. Prorak Sendirian Berhad

2. Raja Lope & Tan Co
(suing as a firm) ... Plaintiffs

and

Tenaga Nasional Berhad
(formerly known as Lembaga
Letrik Negara Tanah Melayu) ... Defendant

Grounds of Judgment

The trial in this case was first held over two days, on 5 and 7 November 1996, whereupon it was set down for continued hearing on 5 and 6 March 1997.

On 5 March 1997, counsel for the plaintiffs was present while counsel for the defendant was absent even as late as 9.49am, the case having been stood down for him to appear. Counsel for the plaintiffs then informed the court that he had spoken with counsel for the defendant who had told him that he was not aware of the hearing that day. The court found it perplexing to be so informed as counsel for the defendant had been present in court at the last hearing date and the dates for continued hearing were fixed according to the free dates of counsel for both parties. However, the matter was adjourned to 22 and 23 July 1997 for continued hearing at the request of counsel for the plaintiffs, upon his undertaking to inform counsel for the defendant of the new dates for the continued hearing of the case.

On 22 July 1997, the case was stood down until 9.10am for counsel for the defendant to make his appearance. Counsel for the plaintiffs then applied for the case to be stood down further.

This was refused. He then applied for judgment in the terms of the statement of claim and for the counterclaim to be dismissed with costs. This was granted.

The case was recalled at 10.50am when counsel for the defendant finally turned up. He apologised for being late and put forth the usual excuse, this time of a road diversion, that counsel turning up late for court in Kuala Lumpur are wont to advance of traffic jams and traffic diversions. He applied to have the judgment set aside and the counterclaim restored.

Counsel for the plaintiff had no objection provided a formal application was made, to which counsel for the defendant agreed.

The application to set aside the judgment entered on 22 July 1997 and to restore the counterclaim came up for hearing on 13 August 1997 *vide* encl. (58). This time both parties did not appear although the matter was stood down until 9.25am, whereupon I dismissed the application in encl. (58).

More than one month later, on 16 September 1997, the defendant filed another application *vide* encl. (61) to revive encl. (58) which had been dismissed on 13 August 1997. The application was supported this time by the affidavit of a different counsel in encl. (60). He admitted being late for court by fifteen minutes on 13 August 1997 owing to, this time, "lalu lintas yang luar biasa" and stating that the defendant had a good case without condescending to the merits thereof, as had also been similarly done in the affidavit at encl. (57) in support of the application at encl. (58) whose revival was now sought.

When the application in encl. (61) came up for hearing on 21 October 1997, the plaintiffs objected to its being allowed. Their counsel argued that this second application was filed more than one month after the earlier application had been dismissed without any explanation as to the delay, which explanation was highly relevant in the circumstances.

A further objection raised was based on the fact that counsel for the defendant never informed counsel for the plaintiffs of the outcome of the application in encl. (58) even though the plaintiffs had had no objection to it and counsel for the defendant was to have mentioned on their behalf. Counsel for the plaintiffs only became aware of what had happened when served with a copy of encl. (61) on 10 October 1997. This evidenced *mala fide* on the part of the defendant's solicitors or a frivolous attitude towards the action.

Counsel for the plaintiffs also submitted that "the affidavit in support of encl. (61) at encl. (60) was not full, frank and candid". He submitted that a party seeking the court's discretion must file a full, frank and candid affidavit whereas the affidavit in"question did not give any reason for the late arrival of the defendant's counsel, it failed to show what steps were taken to rectify the matter contemporaneously, and it did not show what sort of discretion it was asking the court to exercise by showing details of the merits of the case or showing it was just to do so. He concluded that the defendant had not shown that it was just to restore the action to the list.

Counsel for the defendant admitted that the affidavit in support of the application fell short of what was required. However, he submitted that as the matter was in the midst of trial, the application should be allowed and the solicitor should be penalised by being asked to pay costs personally.

Having heard counsel for both sides, I dismissed the application with costs. The judgment entered on 22 July 1997 was not strictly a default judgment as the trial had already commenced. After the two days of hearing had been completed, the subsequent hearing on 5 and 6 March 1997 had to be aborted as counsel for the defendant did not turn up (leaving aside the unavailability of the Chinese interpreter on the 5th as the trial could have proceeded with the evidence of non-Chinese speaking witnesses being taken first). His reason of not being aware of the continued hearing dates cannot be accepted when they were fixed in his presence and with his knowledge. Despite this, an adjournment was granted.

On 13 August 1997, no one turned up for the hearing of the application in encl. (58) which was then dismissed. No reason was given in the affidavit in support of encl. (61) as to why counsel for the defendant waited for more than one month to apply to revive encl. (58). According to him, he came late to court on 13 August 1997. Therefore he should have known what had happened to his application.

The conduct of counsel for the defendant throughout the proceedings in this case did not appear to show, to say the least, seriousness in wanting to defend the claim and prosecute the counterclaim.

To my mind, the chronology of events as set out above and the failure of the defendant to comply with O. 42 r. 13 of the Rules of the High Court 1980 are sufficient grounds for my refusal to grant the defendant's application. As the defendant was aware of the judgment which had been entered against it on 22 July 1997, there was no need for the plaintiffs to serve the defendant with the judgment, particularly when the plaintiffs themselves were not objecting to the application to set aside the judgment in the beginning. In the circumstances the defendant has only its solicitors and counsel to blame for what transpired. The court gave more than sufficient leeway in the prevailing situation to the defendant before dismissing the application in encl. (61) with costs.

Dated 13 March 1998.

[Dato' T Selventhiranathan]
Judge
High Court
Kuala Lumpur

For the plaintiffs	...	SC Yong
Solicitors		Messrs Peter Yip & Yong
For defendant	...	Muhammad Nur Azmi bin Hashim and subsequently Zulkifli Nordin
Solicitors		Messrs Bakar & Partners